STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF INSURANCE
AGENTS AND AGENCY SERVICES,

Petitioner,

vs. Case No. 13-4755PL

GREGORY BRUCE SAMPLE,

Respondent.
_____/

RECOMMENDED ORDER

On February 18 through 21, 2014, a final administrative hearing in this case was held in Fort Myers, Florida, and completed on May 27, 2014, by video teleconference at sites in Tallahassee and Fort Myers, Florida, before Linzie F. Bogan, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: David J. Busch, Esquire
Jessie Harmsen, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: Robert J. Coleman, Esquire
Coleman and Coleman
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Fort Myers, Florida 33902

STATEMENT OF THE ISSUE

Whether Respondent, Gregory Bruce Sample, should be disciplined for alleged statutory and rule violations for his role in several insurance transactions.

PRELIMINARY STATEMENT

On November 22, 2013, the Department of Financial Services, Division of Insurance Agents and Agency Services (Petitioner or Department), filed a six-count Administrative Complaint against Gregory Bruce Sample (Respondent). Petitioner withdrew Count IV of the Administrative Complaint during the final hearing.

The Administrative Complaint alleges violations of sections 626.611, 626.621, 626.9521, 626.9541, and 627.4554, Florida Statutes,[1/] and Florida Administrative Code Rules 69B-215.210 and 69B-215.230.[2/] Respondent disputed the allegations in the Administrative Complaint and requested a hearing pursuant to section 120.57(1), Florida Statutes. On December 11, 2013, the matter was referred to the Division of Administrative Hearings (DOAH) for the assignment of an administrative law judge to conduct the final administrative hearing.

At the hearing, Petitioner presented the testimony of Jewel Frisani, Eileen Sarracino, Darlene Morgan, Warren Morgan, Evelyn Langer, Joel Langer, Gail Shane, Kevin Clark, Juanita Midgett, and John Richard Brinkley. Petitioner's Exhibits 1 through 3, 5, 10 through 38, 41 through 102,

104 through 129, 131 through 140, 142 through 153, 216 through 246, 248 through 251, 253, 258 through 271, 273 through 290, and 300 through 305 were received in evidence. Petitioner's Exhibits 4 and 6 through 9 were received for the limited purpose pertaining to the penalty, if any, that may be recommended. Petitioner's Exhibits 39, 40, 103, 130, and 141 were deemed hearsay and received for the purpose of supplementing or explaining other evidence, but not sufficient in themselves to support findings of fact.

Respondent testified on his own behalf and presented the testimony of Ian Sample. Respondent's Exhibits 1 through 16, 28, 29, and 31 through 41 were received in evidence.

The Transcript of the final hearing was filed on June 27, 2014. Respondent moved for an extension of time for the submission of proposed recommended orders, which was granted. Each party timely filed a Proposed Recommended Order which received due consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

A. Count I – Jewel Frisani

1. Jewel Frisani was born December 22, 1932. As of September 23, 2010, Ms. Frisani owned two annuities; one issued by MetLife and the other issued by ING Golden American (ING). Ms. Frisani was withdrawing $500 per month from each annuity for

a total of $1,000 per month, or $12,000 per year. Death benefits were provided as a feature of each annuity.

2. On September 23, 2010, Ms. Frisani attended a luncheon seminar hosted by Respondent. While at the seminar, Ms. Frisani completed a questionnaire wherein she provided her name, address, and phone number. The questionnaire directs that individuals completing the same should note thereon "Topics of Most Interest to Me." The questionnaire lists some 25 topics and Ms. Frisani noted that she was only interested in having Respondent to "[r]eview[] [her] existing annuity(ies)." One of the listed topics is "[e]state [p]lanning." Ms. Frisani did not indicate on the form that she was interested in discussing with Respondent matters related to planning her estate.

3. Soon after the seminar, Respondent contacted Ms. Frisani and they agreed that they would personally meet on October 5 and October 11, 2010, to discuss matters related to her existing annuities.

4. On October 5, 2010, Ms. Frisani met with Respondent to discuss her MetLife and ING annuities. During the meeting, Ms. Frisani showed Respondent a "Portfolio detail" for her ING annuity and a "snapshot" summary of her MetLife annuity. The "Portfolio detail" showed that as of September 30, 2010, the ING annuity had a market value of $65,604.77. The "snapshot" of Ms. Frisani's MetLife annuity showed that at the beginning of the

year, the opening value of her annuity was $50,638.98 and her closing value as of September 30, 2010, was $46,807.73. Neither the "Portfolio detail" nor the "snapshot" summary listed any charges associated with surrendering either annuity.

5. During the meeting with Respondent on October 5, 2010, Ms. Frisani informed Respondent that her "annuities were going to be [the] inheritance for [her] granddaughter." This explains why the words "Prisilla Frisani granddaughter" appear in Respondent's handwriting on the bottom of the "Portfolio detail." Although Ms. Frisani informed Respondent of her desire to leave an inheritance for her granddaughter, she did not impress upon Respondent that any new product(s) that she might purchase must offer death benefits in an amount not less than what she already had with MetLife and ING. Specifically, as to this issue, Ms. Frisani testified as follows:

> Q. What investment goals did you share with [Respondent] at that meeting? What did you tell him you wanted out of --
>
> A. I wanted him to see if he could do better than what I was getting from my annuities.
>
> Q. Okay. And as you stated earlier, what you did like about your old annuities was that -- what was it that you stated earlier that you liked about your old annuities?
>
> A. Oh, that I was getting a thousand a month from my -- from my checking, and then they had death benefits for my granddaughter.

Q. Did you also share with Mr. Sample that you wanted to continue those benefits?

A. No, I didn't mention that to him there.

Q. You didn't mention the death benefits?

A. The death benefits, no.

Q. Did you mention -- so you just mentioned that you wanted --

A. I wanted him to make sure that what he was doing would go in the trust, and that I would continue getting my thousand a month.

Q. Okay.

A. -- from the annuities --

Q. Okay.

A. -- and that I wouldn't lose no money by switching.

Q. Okay. And you say he was aware that both annuities had death benefits?

A. Well, I don't know if he was aware of that or not, but

Q. Okay.

A. We didn't discuss too much about the death benefits.

Final Hearing Transcript, pp. 149-151.

6. Respondent credibly testified that had Ms. Frisani explained to him that her objective was to maximize the death benefits payable to her granddaughter, then he would have recommended life insurance as a vehicle for her investments instead of annuities.

7. Ms. Frisani also contends that during her meeting with Respondent on October 5, 2010, he assured her that she would not lose any money by surrendering the ING and MetLife annuities. When Ms. Frisani met with Respondent on October 5, 2010, she informed Respondent she was taking a $500 per month partial withdrawal from her ING annuity as well as a $500 per month partial withdrawal from her MetLife annuity. Ms. Frisani also had $200,000 in the bank, some of which may have been in a money market account. When asked if she shared information with Respondent concerning the $200,000, Ms. Frisani testified that "I might have mentioned it, yeah."

8. Ms. Frisani's ING annuity was characterized as a qualified retirement account. Due to her age, in order to avoid a tax penalty on this qualified account, Ms. Frisani was required to take a minimum distribution of four percent annually.

9. Ms. Frisani's MetLife annuity was a non-qualified account. Therefore, she did not have to take from it any required minimum distributions (RMD).

10. Respondent suggested to Ms. Frisani that as a means of paying less in taxes and obtaining growth on her investments, without losing any principal in the stock market, she should consider replacing the ING and MetLife variable annuities with National Western fixed annuities, and that for her $12,000 annual withdrawals she should take $3,000 a year in partial withdrawals

from the National Western qualified annuity he was offering her and $9,000 a year from her money market account. The $3,000 per year in withdrawals from the qualified National Western annuity would satisfy her RMD without incurring any penalty. Since her money market account was paying very little interest, the $9,000 a year from this account would make up the balance of money she needed for her annual income. The non-qualified National Western annuity could then grow at a higher interest rate than the funds in Ms. Frisani's money market account.

11. In order to assist Ms. Frisani with her efforts to learn more about the National Western annuity, Respondent, during the meeting of October 5, 2010, gave Ms. Frisani a copy of National Western's multi-page brochure. The brochure allowed Ms. Frisani to familiarize herself with the National Western annuity prior to their next meeting on October 11, 2010.

12. On October 11, 2010, Ms. Frisani met with Respondent a second time. During this meeting, Ms. Frisani signed several forms related to the surrender of the ING and MetLife annuities, and the purchase of annuities from National Western. It is undisputed that each form was completed by Respondent and signed by Ms. Frisani. Ms. Frisani testified that she did not bother to read the documents that Respondent gave her to sign.[3/]

13. One of the forms signed by Ms. Frisani for each of the National Western annuities is the Annuity Suitability

Questionnaire. The questionnaire asks two related questions. The first question asks "[w]ill the proposed annuity replace any product?" and the second asks "[i]f yes, will you pay a penalty or other charge to obtain these funds?" The answer noted on the form to the first question is "yes," and the answer to the second question is "no."

14. During the October 11, 2010, meeting with Respondent, Ms. Frisani also signed, for both National Western annuity contracts, a "Disclosure and Comparison of Annuity Contracts" form (Comparison form). This form facilitates the side-by-side comparison of certain features of an existing annuity contract with those of a replacement annuity contract. Near the top of the Comparison form, there is a line where the contract number for the existing annuity is to be placed. On the Comparison form for the MetLife annuity, the contract number "3201353529" appears. This is the correct contract number for the MetLife annuity. On the Comparison form for the ING annuity, the contract number "I038301-0D" appears. This is the correct contract number for the ING annuity. Neither of these contract numbers appears on the "snapshot" or the "Portfolio detail" documents that Ms. Frisani presented to Respondent during their initial meeting on October 5, 2010.

15. Ms. Frisani received quarterly statements from both ING and MetLife for the annuity contracts that she had with these

companies. The ING and MetLife quarterly statements for the period ending September 30, 2010, each lists the annuity contract number, the contract date, and other pertinent information. The MetLife quarterly statement indicates that as of September 30, 2010, Ms. Frisani's MetLife annuity had an account balance of $46,684.92 and a death benefit in the amount of $57,160.41. Ms. Frisani's ING quarterly annuity statement for the period ending September 30, 2010, shows the following:

Guaranteed Minimum Death Benefit	$115,859.39
Accumulation Value	$ 65,491.51
Surrender Charges	$ 1,345.01
Cash Surrender Value	$ 64,146.50

16. When Respondent met with Ms. Frisani on October 11, 2010, the evidence reasonably suggests that Ms. Frisani had her quarterly statements with her and presented the same to Respondent so as to assist him with completing the paperwork related to the surrender of Ms. Frisani's existing annuities and the purchase of the new annuities from National Western.

17. For Ms. Frisani's MetLife annuity, Respondent wrote on the Comparison form that this annuity contract was issued in "Yr99." The MetLife quarterly statement that Ms. Frisani presented to Respondent shows, however, that the actual date of issue for the MetLife annuity was April 22, 2005. The evidence does not sufficiently explain this discrepancy.

18. For the MetLife annuity, Respondent also noted on the Comparison form that this annuity had a nine year surrender charge period and a first year surrender charge rate of nine percent that decreased by one percentage point each year that the annuitant maintained the policy. Although Respondent accurately noted the surrender period and related percentages on the Comparison form, it is not clear from the evidence where Respondent got this information, given that neither the MetLife quarterly statement for the period ending September 30, 2010, nor the "snapshot" make mention of surrender charges or related percentages. Respondent, nevertheless, obviously knew of the surrender period and related charges for Ms. Frisani's MetLife annuity.

19. The Comparison form also notes that the MetLife annuity provides for a "Waiver of Surrender Charge Benefit or Similar Benefit." Again, however, there is nothing in the MetLife quarterly statement or "snapshot" that makes mention of the waiver of any surrender or similar charges.

20. During the meeting with Respondent on October 11, 2010, Ms. Frisani also signed, for the MetLife annuity, a form titled "DISCLOSURE OF SURRENDER CHARGES IF EXISTING ANNUITY IS REPLACED OR EXCHANGED." There is a section of the disclosure form where estimated surrender charges are noted. For this section, Respondent wrote in "0" as the amount of surrender charges

associated with replacing the MetLife annuity with an annuity from National Western.

21. Contrary to Respondent's representations on the form, Ms. Frisani incurred $2,142.50 in surrender charges related to the surrender of the MetLife annuity contract. On October 11, 2010, when Respondent met with Ms. Frisani, he knew, or should have known, based on the information available to him, that Ms. Frisani would incur surrender charges related to the surrender of the MetLife annuity. The totality of the evidence as to this transaction indicates that Respondent willfully misled Ms. Frisani, thus causing her to be misinformed about the charges related to the surrender of her MetLife annuity.

22. Petitioner also alleges that Ms. Frisani suffered financial harm as a result of Respondent deceiving her into believing that she would not incur charges related to the surrender of her ING annuity. According to Petitioner, Ms. Frisani incurred $1,345.01 in surrender charges related to this transaction. The evidence of record is insufficient to support this allegation.

23. The "DISCLOSURE AND COMPARISON OF ANNUITY CONTRACTS" form that Respondent completed for Ms. Frisani's ING annuity notes that nine years was the surrender charge period for this annuity. If this representation is true, the surrender charge would terminate in November 2009. Petitioner's Exhibit 37

contains a summary of the terms of Ms. Frisani's ING annuity and it shows seven years as the surrender charge period for this annuity. Whether it is seven years or nine years, neither of these yearly figures would result in a surrender charge, given that Ms. Frisani had held the ING annuity for nine years and eleven months at the time of actual surrender.

24. To further complicate matters, Ms. Frisani's ING quarterly statement for the period ending September 30, 2010, shows that if she were to surrender the annuity on September 30, 2010, she would incur $1,345.01 in surrender charges. As previously noted, Ms. Frisani's ING annuity, as of September 30, 2010, had an accumulated value of $65,491.51. Subtracting the stated surrender charges would result in a cash surrender value of the ING annuity of $64,146.50. When this annuity was actually surrendered on or about October 25, 2010, ING issued a check in the amount of $65,172.33 to National Western for Ms. Frisani's new annuity. The evidence does not explain with sufficient clarity why there is only a $319.18 difference between the accumulated value as of September 30, 2010, and the actual cash surrender value as of October 25, 2010.

25. Also, on or about October 22, 2010, ING sent Ms. Frisani a "Confirmation Notice" regarding transactions related to her annuity account. The Confirmation Notice provides the name (Jeffrey A. Masters), phone number, and mailing address

for Ms. Frisani's ING financial advisor along with a notice advising that "The ING Variable Annuity Customer Contact Center is available Monday through Thursday 8:30 AM to 6:30 PM Eastern Time and Friday 8:30 AM to 5:30 PM Eastern Time at 1-800-366-0066." The Confirmation Notice also states the following:

> **IMPORTANT NOTICE:** Please carefully review all of the transactions detailed on this confirmation notice. **You must inform us of any errors we may have made with respect to allocations of your investment dollars within 30 days from the date of this notice.** If you do not respond within 30 days, all allocations listed on this confirmation notice will be deemed final pursuant to your instructions.

26. The Confirmation Notice lists two transactions with an effective date of October 22, 2010. The first transaction shows a "Total Cash Surrender" of $65,172.33, and the second transaction shows a "Total Surrender Charge" of $1,345.01.

27. Independent of what Respondent may have told Ms. Frisani, she was given notice by ING that there was a $1,345.01 charge associated with surrendering her ING annuity and that she had 30 days from the date of the notice to inform ING about any irregularities associated with the transaction. There is no evidence that Ms. Frisani ever contacted ING or Jeffrey A. Masters about the $1,345.01 surrender charge. Also, Ms. Frisani had until November 21, 2010, to inquire about the surrender charges or any other matters, including death benefits, related

to the surrender of her ING policy. There is no evidence suggesting that Ms. Frisani availed herself of this option. Petitioner failed to prove that Ms. Frisani suffered, as a consequence of Respondent's conduct, financial harm in the amount of $1,345.01, as alleged.

28. The Department also alleges that Respondent misrepresented to Ms. Frisani that she would receive a $9,000 bonus following her first year of ownership of the National Western annuities. Respondent denies this allegation. None of the documentary evidence references a $9,000 bonus and the only testimony regarding this alleged bonus is from Ms. Frisani. Ms. Frisani's testimony, without more, is insufficient to satisfy Petitioner's burden with respect to this allegation.

29. In its Proposed Recommended Order, Petitioner contends that Respondent "stated on Ms. Frisani's disclosure and comparison of annuity contracts that she would not incur any administrative fees or margins, but the National Western (annuity number 0101255052) contract clearly states otherwise." It is correct that the disclosure and comparison form notes that the National Western annuity will have zero "Administrative fees or Margins." The disclosure and comparison form in evidence does not define what constitutes an administrative fee or margin. Petitioner equates the "charge" that Ms. Frisani paid for the National Western annuity withdrawal benefit rider with an

administrative fee, but the record does not support Petitioner's conclusion.

30. There is no indication that National Western considers the charge for the withdrawal benefit rider as an administrative fee. The National Western documents signed by Ms. Frisani advise that "[t]he Account Value of the policy is reduced each year by the Annual Rider Charge" and "[t]here is a charge for this rider, which is assessed annually." (emphasis added). In looking at Ms. Frisani's National Western statement for this annuity for the period November 4, 2010, through September 26, 2011, the only "fee" listed is an "Option A Asset Fee" that shows zero as the percentage associated with it. The annual rider charge is not listed as an "administrative" or any other type of fee. Without more, the undersigned is unable to conclude that the annual rider charge is the equivalent of an "administrative fee" as these terms are used in the disclosure and comparison form signed by Ms. Frisani on October 11, 2010.

31. Respondent explained his rationale for recommending the National Western annuities to Ms. Frisani. He estimated that Ms. Frisani may have made $5,000 with her ING variable annuity in the ten years that she owned it and $5,000 with the MetLife variable annuity in the five years she owned that annuity, so her net return was a half percent and one percent, respectively. On the other hand, the National Western fixed annuities Respondent

sold Ms. Frisani had a guaranteed five percent growth so she would be earning ten times the amount she had been making on her ING annuity and five times the amount for her MetLife annuity. The National Western annuities also included a five percent bonus, which approximated $6,000.

32. Respondent summarized his comparison of the National Western annuities he sold Ms. Frisani with the ING and MetLife annuities she previously owned as follows:

> [S]o she had these old contracts with no safety, that had produced a half percent interest from the get-go for ten years. We moved her to National Western, which is an equity index annuity. The principal is fixed. It had a five percent income rider guarantee, which is what she wanted. And we were able to take the nonqualified account and just let it grow. The other is the qualified contract. She -- she has to take out four percent for her RMD. She's making five, which means she continues to actually make some money. Had she stayed with the variable, she was just depleting it every year by this four percent. So she was losing principal every year, so we stopped that. We stopped that. It's stopped cold.

Final Hearing Transcript, pp. 1157-1158.

33. Respondent further explained that Ms. Frisani's National Western annuities are structured so she can withdraw up to ten percent annually from the account, but if she does not take any withdrawals in the first year then she is allowed to take up to twenty percent in the second year, and if she elects not to take any withdrawals in the second year then she may withdraw up to

thirty percent for the third year, and so on for the duration of the annuity period.

34. Respondent had an objectively reasonable basis for recommending the National Western annuities to Ms. Frisani.

B. Count II – Fred and Eileen Sarracino

35. Fred Sarracino and Eileen Sarracino are married and reside in Lake Placid, Florida. Mr. Sarracino was born on September 20, 1934, and is a retired automobile mechanic. Mrs. Sarracino was born on February 1, 1935, and is retired from working for an insurance broker in Pennsylvania.

36. In October 1993 Mr. Sarracino paid an initial premium of $2,000 towards the purchase of an Allmerica Financial Life Insurance and Annuity Company variable annuity contract (Commonwealth 46). Over the next 15 years, he added premium payments to Commonwealth 46 so that it had a surrender value of $46,435.53 on June 30, 2008, and an enhanced death benefit of approximately $54,000 on March 31, 2008.

37. In October 1993 Mrs. Sarracino paid an initial premium of $2,000 towards the purchase of a separate Commonwealth variable annuity contract (Commonwealth 45). Over the next 15 years, she added premium payments to Commonwealth 45 so that it had a surrender value of $18,979.81 on June 30, 2008, and an enhanced death benefit of approximately $75,000 on March 31, 2008.

38. In September 1997 Mrs. Sarracino paid an initial premium payment of $94,226.16 toward another Commonwealth variable annuity contract (Commonwealth 03). Over the next 11 years, she added premium payments to Commonwealth 03 so that it had a surrender value of $172,831.01 on June 30, 2008, and an enhanced death benefit of over $237,000 on March 31, 2008.

39. During the initial months of 2008, Mr. and Mrs. Sarracino were losing money on their Commonwealth variable annuities and decided, in mid-2008, to attend a seminar presentation hosted by Respondent at a restaurant in Sebring, Florida.

40. Mr. and Mrs. Sarracino met privately with Respondent on June 30, 2008. Acting on Respondent's recommendations, Mr. Sarracino surrendered Commonwealth 46 and used the proceeds of $46,435.53 to purchase an Old Mutual Financial Life Insurance Company annuity (Old Mutual 67). Mrs. Sarracino surrendered Commonwealth 45 and applied the proceeds of $18,979.81 to purchase an Old Mutual annuity (Old Mutual 68). Mrs. Sarracino also surrendered Commonwealth 03 and applied the proceeds of $172,402.45 to purchase yet another Old Mutual annuity (Old Mutual 69). In total, Respondent earned $31,428.52 in commission from these transactions.

41. When Respondent took the applications for each of the Old Mutual annuities, he misrepresented the financial profile of the Sarracinos on the annuity suitability forms. Respondent

accomplished this in part by having the Sarracinos sign blank suitability forms which Respondent later filled in with false information.[4/]

42. Respondent falsely noted on the suitability form that Mrs. Sarracino's monthly disposable income was $1,600. Mrs. Sarracino credibly testified that her monthly disposable income when she met with Respondent was more in the range of four to five hundred dollars. Respondent also falsely noted on the form that Mrs. Sarracino owned $60,000 worth of certificates of deposit (CDs), variable annuities amounting to $300,000, and had $60,000 in mutual funds.

43. Respondent noted on the suitability form that Mr. Sarracino, like his wife, also had monthly disposable income in the amount of $1,600. This is false. Respondent also falsely noted on the form that Mr. Sarracino owned $60,000 worth of CDs, variable annuities totaling $300,000, and $60,000 in mutual funds. Finally, Respondent falsely stated that Mr. Sarracino owned a life insurance policy with a cash value of $10,000. The unrefuted evidence is that Mr. Sarracino has never owned a life insurance policy of any amount.

44. Respondent willfully misrepresented the financial profile of the Sarracinos so that they could pass Old Mutual's underwriting standards and he could receive a commission.

C. Count III – Warren and Darlene Morgan

45. Warren and Darlene Morgan are married and live in Port Charlotte, Florida. Mr. Morgan was born on May 24, 1947. Mrs. Morgan was born on April 21, 1948.

46. In 2005, the Morgans decided they should consult a financial advisor closer to their home. In May and June 2005, the Morgans met with Respondent for the purpose of purchasing four Allianz annuities.

47. On May 28, 2005, Mr. Morgan made an initial premium payment of $56,949.16 toward the purchase of the first Allianz annuity contract (Allianz 32).

48. On May 28, 2005, Mr. Morgan made an initial premium payment of $16,701.27 toward the purchase of a second Allianz annuity contract (Allianz 22).

49. On May 28, 2005, Mrs. Morgan purchased the third Allianz annuity contract (Allianz 02). The initial premium payment was $16,701.27.

50. On June 15, 2005, Mrs. Morgan purchased the fourth Allianz annuity contract (Allianz 43). She made three premium payments on this policy between May 28, 2005, and June 15, 2005, totaling $68,040.34.

51. Each of the Allianz annuities Respondent sold the Morgans was intended as a long-term investment as evidenced by the

respective annuities' multi-year surrender charge periods and high surrender charge penalties.

52. After purchasing the Allianz annuities, the Morgans and Respondent met annually to review the Morgans' investments, but until 2010, they decided not to change anything.

53. In early calendar year 2010, Respondent, consistent with the practice of conducting their annual review, called the Morgans and informed them of a new product that might appeal to them. Respondent and the Morgans met on January 7, 2010, and Mrs. Morgan testified that Respondent compared the new product with the Allianz annuities they owned. Mrs. Morgan stated in her testimony that "we asked a lot of questions" during the meeting with Respondent. Mrs. Morgan thoughtfully considered the merits of purchasing the new product and explained that initially she was opposed to replacing their Allianz annuities because she believed the surrender penalty that she and her husband would pay was too steep a price for the exchange. She testified, however, that her husband, Warren, wanted to make the change and so she agreed to do so.

54. On January 7, 2010, when they met with Respondent, Darlene and Warren Morgan were 61 and 62 years of age, respectively, and their investment objective remained focused on growth. During the meeting, Respondent suggested that the Allianz annuities should be replaced with annuities issued by Forethought

Life Insurance Company (Forethought) and Old Mutual Financial Life Insurance Company (OM). The Forethought annuities were offering a new feature known as an "income rider" that was not available when the Morgans purchased the Allianz annuities in 2005.

55. Allianz 32 was exchanged for a Forethought annuity contract (Forethought 03). Mr. Morgan incurred a surrender penalty of $6,151.79 for exchanging this Allianz annuity, which at the time of the exchange was valued at approximately $58,000.

56. Allianz 22 was exchanged for an OM annuity (OM 57). Mr. Morgan incurred a surrender penalty of $4,441.09 for exchanging this Allianz annuity, which at the time of the exchange was valued at approximately $16,000.

57. Allianz 43 was exchanged for a Forethought annuity (Forethought 92). Mrs. Morgan incurred a surrender penalty of $21,469.82 for exchanging this Allianz annuity, which at the time of the exchange was valued at approximately $65,000.

58. Allianz 02 was exchanged for an OM annuity (OM 58). Mrs. Morgan incurred a surrender penalty of $4,441.09 for exchanging this Allianz annuity, which at the time of the exchange was valued at approximately $16,000.

59. Combined, the Morgans incurred $36,503.79 in surrender penalties associated with the exchange of their annuities. Respondent’s total commission for these transactions was $16,581.62.

60. The Administrative Complaint alleges that Respondent "hurriedly pushed annuity application and suitability forms in front of Mr. and Mrs. M[organ] and had them sign them without allowing them any time to review them," and that the "entire meeting on or about January 7, 2010, lasted approximately 20 minutes." The Administrative Complaint also alleges that consistent with Respondent's alleged conduct of rushing the Morgans, he had them sign blank forms related to the exchange of the Allianz annuities.

61. According to Mrs. Morgan's testimony, the meeting with Respondent on January 7, 2010, lasted approximately 45 minutes (more than twice as long as alleged), during which they "asked a lot of questions." As for the issue of allegedly signing blank forms, Mrs. Morgan testified as follows:

> Q: Did you sign blank forms or were they partially filled out?
>
> A: I don't know. Because he was at his desk writing very fast. Part of it could have been filled out.

Final Hearing Transcript p. 645

> Q: All right. But what I'm asking you is: As you sit here today, can you state with certainty that any of the forms that he had you sign were, in fact, blank?
>
> A: No, I cannot state with certainty that.

Final Hearing Transcript p. 678

62. The evidence is insufficient to clearly and convincingly establish that the Respondent rushed the Morgans into exchanging their Allianz annuities or that Respondent had them to sign blank documents.

63. Respondent, in filling out the transfer, application, and suitability forms for the purchase of the Forethought and OM annuities, listed therein information regarding the Morgans that was false. Respondent included a false statement that the Morgans had a net worth of $400,000, excluding the value of their home, that the Morgans' liquid assets totaled $65,000, and that the Morgans owned CDs. Respondent willfully misrepresented the financial profile of the Morgans so that they could pass the Old Mutual and Forethought underwriting standards thereby allowing him to receive a commission.

64. Petitioner, in its Proposed Recommended Order, offers several proposed factual findings that ultimately show, "[b]ased on all of the evidence, [that] there was no objectively reasonable basis to recommend the Morgans' annuity exchanges. § 627.4554(4)(a), Fla. Stat. (2010)." Section 627.4554, by its express terms, only applies to "Senior consumers" that are "65 years of age or older." Neither of the Morgans was within this age range when they met with Respondent in 2010 and, therefore, section 627.4554 cannot be relied upon by Petitioner as a basis for imposing disciplinary action against Respondent.

D. Count IV

65. Petitioner withdrew Count IV of its Administrative Complaint.

E. Count V – Joel and Evelyn Langer

66. Petitioner alleges that Respondent told Joel and Evelyn Langer that he was familiar with the "IRS 72t rule," when in reality he was not, and because of his unfamiliarity with this rule, this meant that Respondent "knew that by selling the Langers' annuities, they would incur substantial withdrawal penalties [pursuant to] the terms of the[ir] annuity contracts." The essence of this allegation is that Respondent did something wrong in arranging for the issuance of the OM annuities that adversely affected the Langers' 72(t) protections with the Internal Revenue Service (IRS) and also caused them to lose money.

67. Joel and Evelyn Langer are married and reside in Port Charlotte, Florida. Mr. Langer was born on September 10, 1948. Mrs. Langer was born on August 31, 1949. During their employment, Mr. and Mrs. Langer put their savings in mutual funds managed by Royal Bank of Canada Wealth Management (RBC).

68. Mr. and Mrs. Langer were forced into early retirement before reaching age 59 1/2. The mutual fund investments then became their only liquid assets and they depended on these funds for income.

69. On February 21, 2008, Mr. and Mrs. Langer, who were 58 and 59 years of age respectively, attended a luncheon seminar Respondent hosted in Port Charlotte, Florida. The Langers were interested in obtaining more information about annuities, because they had their life savings invested in the stock market, which was rapidly declining, and they were looking to move their funds to another investment product. The Langers felt annuities would be "a safer investment."

70. The Langers met with Respondent and explained that they would need immediate income that would qualify for disbursement under the 72(t) provisions of the federal income tax code. Because the Langers had been forced into early retirement, they had elected to draw on their investments through the 72(t) provisions of the federal income tax code. The 72(t) provisions allow the investor, prior to age 59 1/2, to receive distributions from their retirement investment, in substantially equal periodic payments without paying a penalty for early withdrawal, provided the investor receives the distribution for a period of five years without interruption.

71. Respondent placed all of Mr. and Mrs. Langer's liquid assets into three Old Mutual annuity contracts, hereinafter "Old Mutual 02," "Old Mutual 03" and "Old Mutual 04."

72. On March 7, 2008, Mrs. Langer purchased Old Mutual 02. The initial premium was paid with an RBC check in the amount of

$237,563.23, made payable to Old Mutual Financial Life. Respondent earned a commission in the amount of $26,131.96 for this transaction.

73. On March 7, 2008, Mr. Langer purchased Old Mutual 03. The initial premium was paid with an RBC check in the amount of $393,073.89, made payable to Old Mutual Financial Life. Respondent earned a commission in the amount of $43,238.13 for this transaction.

74. On March 7, 2008, Mrs. Langer purchased Old Mutual 04. The initial premium was paid with an RBC check in the amount of $72,572.48, made payable to Old Mutual Financial Life. Respondent earned a commission in the amount of $7,982.97 for this transaction.

75. As previously noted, Petitioner alleges that the Langers incurred "substantial withdrawal penalties" as a consequence of Respondent botching the paperwork related to the Langers maintaining the protections afforded by the IRS 72(t) rule. Although the evidence is not at all clear as to the amounts of the alleged penalties, it appears as though the Langers did not actually incur any penalties, as alleged, because OM, on or about April 8, 2008, issued refund checks to Mr. and Mrs. Langer in the amounts of $1,329 and $2,018, respectively.

76. As for the alleged mishandling by Respondent of the Langers' IRS 72(t) paperwork, Petitioner's expert witness, John

Richard Brinkley, testified that he assumed Respondent failed to send the IRS the necessary paperwork to entitle the Langers to the IRS rule 72(t) privileges for the OM annuities sold to them by Respondent. Mr. Brinkley conceded, however, that he never verified whether the necessary forms were or were not delivered, or to whom such fault should be allocated.

77. Similarly, both Mr. and Mrs. Langer conceded during their testimony that they could not say whether it was Respondent's supposed error in qualifying the OM annuities under the IRS rule 72(t) provisions, or whether the supposed error was the fault of OM itself. The unrefuted evidence is that Respondent faxed OM specific instructions to set up the annuities so that the annuities complied with the IRS rule 72(t) provisions and that OM subsequently confirmed, in letters sent to each of the Langers, that the annuities indeed were being set up to conform to the IRS rule 72(t) provisions. While there is evidence that Respondent initially may have completed the incorrect OM form for this transaction, the evidence is inconclusive as to the effect this had on how the OM annuities were originally structured by the company. Additionally, the Department's investigator, Juanita Midgett, wrote to OM inquiring as to whether Respondent bore any responsibility in ensuring that the annuities he sold the Langers did, in fact, conform to the IRS rule 72(t) provisions. OM's letter in response stated that Respondent bore no responsibility for any "premature

penalty tax," and reminded Ms. Midgett that the Langers were required "to consult their personal tax advisor before submitting a request should they elect to take early distributions from their retirement funds." Petitioner has failed to meet its burden of proof with respect to this issue.

78. The Administrative Complaint also alleges that "[d]ue to [Respondent's] failure to take into account the L[angers'] necessity for a monthly income, the OM 02 and OM 03 contracts had to be reissued thereby altering the initial premiums" paid by the Langers. The only argument advanced by Petitioner in its Proposed Recommended Order as to this issue is found in paragraph 35 wherein Petitioner simply restates that Respondent "failed to properly account for the Langers' need for a monthly income and, as a result, the Old Mutual 02 and Old Mutual 03 contracts had to be reissued thereby altering the initial premiums" paid by the Langers.

79. It is unclear from the evidence why the referenced contracts had to be reissued. Petitioner's allegations imply that the "altering [of] the initial premiums" resulted in the Langers incurring additional expense as a result of the error, but the evidence is inconclusive as to whether the premium amounts increased or decreased. Petitioner failed to meet its burden of proof with respect to this issue.

80. Paragraph 71(c) of the Administrative Complaint alleges that Respondent "never explained to the [Langers] that all three annuities had huge surrender charge rates and periods, starting at 17.5% for the first year of ownership and diminishing thereafter until the penalty percentage reached 4.5% in the fourteenth year of ownership." Remarkably, Petitioner's Proposed Recommended Order as to this allegation simply restates, verbatim, the allegation from the Administrative Complaint and only cites to the annuity contracts themselves as record support for the allegation.[5/] This allegation is not sufficiently supported by the evidence, given that Mrs. Langer testified that Respondent explained to them, with respect to the issue of surrender charges associated with the annuities, that they "had to remain in [the annuities] for a period of years."

81. Paragraph 71(d) of the Administrative Complaint alleges that Respondent "knew that the Langers wanted to be done with the risks associated with the stock market and yet [he] pegged all three Old Mutual annuities to S&P 500 indices in determining their income returns." Once again, Petitioner merely restates in its Proposed Recommended Order the allegation from the Administrative Complaint and only cites to the annuity contracts themselves as record support for the allegation. Nevertheless, Mrs. Langer testified that "at the seminar, [Respondent] went over the benefits [of the] annuities and went into detailed explanations of

his annuity plans being tied to the S&P 500, and he did quite a bit of explaining at the seminar." The Langers knew that the annuity products that Respondent was selling were tied to the S&P 500 well in advance of purchasing the products. The evidence clearly establishes that the Langers knew what Respondent was selling and that they made a conscientious and informed decision when they ultimately decided to purchase the three Old Mutual annuities.

82. Paragraph 71(e) of the Administrative Complaint alleges that Respondent "checked a box on the Old Mutual suitability forms indicating that Mr. and Mrs. Langer declined to answer the questions propounded on the form, which was false." Respondent explained that he discussed with the Langers the nature of their assets, but because the totality of their assets consisted of the money in their brokerage account, there was no purpose in completing the "Customer Profile" section of the suitability forms, and so he checked the line on the OM forms indicating that the Langers were declining to answer the questions. Mr. Langer testified that they "explained to [Respondent] that [they] had no other assets to consider" besides their mutual funds. Given this, it is inconsequential that Respondent checked the box signifying that the Langers declined to answer the "Customer Profile" questions.

83. Paragraph 71(g) of the Administrative Complaint alleges that Respondent "refused to respond to the Langers' inquiries once they discovered the financial losses they suffered [due to] his recommendations." Respondent generally denies this allegation but offers no specific defense in response thereto.

84. Mrs. Langer credibly testified that Respondent "would not return her calls" after she and her husband realized that there was a problem with the application of IRS rule 72(t) to their Old Mutual annuities. The evidence does not quantify the number of calls or the length of the time period during which the Langers made calls to Respondent. Respondent's failure to return Mrs. Langer's phone calls is, under the facts present, inconsequential given that the evidence is not clear and convincing regarding any culpability on Respondent's part with respect to Old Mutual's processing of the Langer's IRS rule 72(t) paperwork.

85. Paragraph 71(h) of the Administrative Complaint alleges that Respondent "never explained the 'free look' provision of the three Old Mutual contracts." As to this allegation, Petitioner, in its Proposed Recommended Order, offers as its only proposed finding of fact that Respondent "nullified the free look option by pre-dating the delivery receipt so as to eliminate the Langer's option to cancel the contracts." Alleged actions of "pre-dating" a delivery receipt are substantively different from actions

related to the alleged "failure to explain" a contractual provision. Respondent had no pre-hearing notice of the allegation that Respondent "pre-dated" the delivery receipt and therefore this allegation, even if true, is irrelevant to the allegation that Respondent never explained the free look provision of the three Old Mutual annuities. Petitioner has failed to satisfy its burden of proof with respect to the allegation that Respondent "never explained the 'free look' provision of the three Old Mutual contracts."

86. Petitioner has failed to prove by clear and convincing evidence any violations by Respondent with respect to his dealings with the Langers.

F. Count VI – Gail Shane

87. On February 16, 2012, Gail Shane, who was 65 years old at the time (born June 17, 1946) and an unmarried woman, attended a luncheon seminar conducted by Respondent in Sebring, Florida. At the luncheon, Respondent shared with Ms. Shane information that convinced her that Respondent could place her in an investment product suitable for her needs.

88. Ms. Shane met with Respondent in his Sebring office on March 6, 2012. During this meeting, Ms. Shane explained to Respondent that she was looking for an investment product where she could simply park $5,000 and let it "grow," and that she was not looking for the investment product to provide her with income. In

other words, Ms. Shane wanted an annuity product that would guarantee growth and not reduce her principal investment amount. Per Respondent's recommendation, Ms. Shane purchased a $5,000 annuity issued by National Western Insurance Company (National Western). Respondent's commission for this transaction was $500.

89. During the meeting with Ms. Shane on March 6, 2012, Respondent did not explain to Ms. Shane that the National Western annuity contained a yearly withdrawal benefit rider that cost $40.95 per year. According to the annuity contract, the withdrawal benefit rider "provides guaranteed minimum withdrawal benefits . . . in an amount selected by [Ms. Shane on a] semi-annual, quarterly, or monthly payment" basis. At the time of purchase, Ms. Shane did not bother to read the terms and conditions of the annuity product and her omission, coupled with Respondent's failure to explain to her the inclusion in the policy of the yearly withdrawal benefit rider, resulted in Ms. Shane not knowing that the annuity contained the rider.

90. It was only after Ms. Shane received a statement from National Western that she realized that her annuity contained a rider that she did not need and that was otherwise inconsistent with her investment goals of "growth without principal reduction." Ms. Shane, upon learning of the existence of the yearly withdrawal benefit rider, immediately notified National Western and directed the company to remove the rider from her annuity. Per Ms. Shane's

request, National Western removed the rider from her annuity policy. Respondent did not have an objectively reasonable basis for believing that Ms. Shane desired to have the yearly withdrawal benefit rider as part of her annuity contract.

91. Paragraph 79(d) of the Administrative Complaint alleges that Respondent never explained to Ms. Shane that the National Western annuity "had huge surrender charge rates and periods, starting at 15% for the first year of ownership and diminishing thereafter until the penalty percentage reached 2% in the thirteenth year of ownership." As previously mentioned, Ms. Shane's investment objectives were such that she wanted to park her $5,000 initial investment and let it grow. It is true that Respondent did not explain the surrender charge rates to Ms. Shane. However, his failure to do so is not of legal significance given her stated investment strategy.

92. Paragraph 79 of the Administrative Complaint also alleges that Respondent had Ms. Shane to sign suitability forms that were in many respects blank and that Respondent "completed the forms outside [Ms. Shane's] presence . . . [and] failed to provide a copy to Ms. S[hane] for her review so that she could discover the falsehoods that were being forwarded to National Western [for] its underwriter's review."

93. Specifically, paragraph 79(e) of the Administrative Complaint alleges that "after obtaining Ms. S[hane]'s signature on

the annuity suitability form, [Respondent] completed the form outside her presence and indicated therein that she had a net worth of $1,000,000 knowing that [this representation] was completely, utterly, and absurdly false." Ms. Shane credibly testified that when she met with Respondent on March 6, 2012, her net worth was somewhere in the neighborhood of $258,000; not anywhere near the $1,000,000 that Respondent noted on the suitability form.

94. Petitioner's Hearing Exhibit 261, p. 803, is the Accredited Investor Acknowledgment Form (Acknowledgment Form) signed by Ms. Shane on March 6, 2012. The first sentence of the Acknowledgment Form provides that "National Western Life Insurance Company is prohibited by Florida Law from selling the annuity for which you have applied to any senior consumer (a purchaser 65 years of age or older) unless that senior consumer is an "Accredited Investor." The Acknowledgment Form also states the following:

> Florida law defines an "Accredited Investor" as any person who comes within any of the following categories at the time of the sale of an annuity to that person:
>
> 1. The person's net worth or joint net worth with his or her spouse, at the time of purchase, exceeds $1 million; or
>
> 2. The person had an individual income in excess of $200,000 in each of the 2 most recent years, or joint income with his or her spouse in excess of $300,000 in each of those

> years, and has a reasonable expectation of reaching the same income level in the current year.

The Acknowledgment Form then requires the proposed annuitant to check the appropriate box, sign, and date the form. Respondent checked the box after Ms. Shane signed the form and noted thereon that Ms. Shane's net worth "exceeds $1 million."

95. Paragraph 79, subparts (f), (g) and (h), of the Administrative Complaint allege, collectively, that "after obtaining Ms. S[hane]'s signature on the annuity suitability form, [Respondent] completed the form outside her presence and indicated therein that she had an annual income of $50,000.00, . . . liquid assets amounting to $80,000.00, . . . [and] that she owned her own home and that she owned real estate worth $500,000.00, knowing that such information was false." Ms. Shane credibly testified that in March 2012, her annual income was "closer to $30,000.00," her liquid assets were "$8,000.00," she rented and did not own a home, and that her undeveloped real estate was "worth about $50,000.00."

96. The Acknowledgement Form makes it abundantly clear that the only way that Respondent could sell the National Western annuity product to Ms. Shane was to qualify her as an "Accredited Investor." In the absence of Ms. Shane being qualified as such, Respondent would not earn a commission.

97. The evidence clearly and convincingly establishes that Respondent willfully misrepresented Ms. Shane's annual income, net worth, liquid assets, residential status, and real estate holdings so that he could receive a commission for the sale of the National Western annuity.[6/]

CONCLUSIONS OF LAW

98. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2014).

99. This is a proceeding in which Petitioner seeks to suspend or revoke Respondent's licenses as a life agent and a life and health agent. Because disciplinary proceedings are considered to be penal in nature, Petitioner is required to prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

100. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). As stated by the Florida Supreme Court, the standard:

> entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and

> without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994)(citing, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1991).

101. Petitioner is limited to proving the charges and allegations pled in the Administrative Complaint. Cf. Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Aldrete v. Dep't of Health, Bd. of Med., 879 So. 2d 1244 (Fla. 1st DCA 2004); Ghani v. Dep't of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); Willner v. Dep't of Prof'l Reg., Bd. of Med., 563 So. 2d 805 (Fla. 1st DCA 1990).

102. Disciplinary provisions such as the referenced sections must be strictly construed in favor of the licensee. Elamariah v. Dep't of Prof'l Reg., 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof'l Reg., 534 So. 2d 782, 784 (Fla. 1st DCA 1988). Disciplinary statutes must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden their application. Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997); see also

Beckett v. Dep't of Fin. Servs., 982 So. 2d 94, 100 (Fla. 1st DCA 2008); Dyer v. Dep't of Ins. & Treas., 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

103. Rule 69B-215.210 declared the business of life insurance to be a public trust that obligates insurance agents to work together in serving the best interests of the public by understanding and observing the laws governing life insurance, presenting accurate and complete facts essential to a client's decision, and being fair in all relations with colleagues and competitors, always placing the policyholder's interests first.

104. Rule 69B-215.230(1) declared insurance sales misrepresentations as to terms, benefits, and advantages of insurance products to be unethical and prohibited.

105. Section 627.4554(4)(a) made it a violation for an insurance agent to recommend to a senior consumer the purchase or exchange of an annuity that results in another insurance transaction or series of transactions, unless the agent has reasonable grounds to believe that the recommendation is suitable based on facts disclosed by the consumer as to his or her investments and other insurance products and financial situation and needs.

106. Section 627.4554(4)(c)2. made it a violation for an insurance agent to make a recommendation to a senior consumer

unless it is reasonable under all the circumstances known to the agent at the time of the recommendation.

107. Section 626.611(5) made it a violation for an insurance agent to willfully misrepresent any insurance policy or annuity contract or to willfully deceive with regard to such a contract.

108. Section 626.611(7) made it a violation for an insurance agent to demonstrate a lack of fitness or trustworthiness to engage in the business of insurance.

109. Section 626.611(8) made it a violation for an insurance agent to demonstrate a lack or reasonably adequate knowledge and technical competence to engage in the business of insurance.

110. Section 626.611(9) made it a violation for an insurance agent to engage in fraudulent or dishonest practices in the conduct of licensed business.

111. Section 626.611(13) made it a violation for an insurance agent to willfully fail to comply with, or willfully violate, any adopted rule or willfully violate any provision of the Insurance Code. This statute is a derivative of other violations requiring willfulness, adds nothing of substance to those violations, and does not warrant additional discipline for the violations from which it is derived.

112. Section 626.621(2) made it a violation for an insurance agent to violate any provision of the Insurance Code or any other law applicable to the conduct of a licensed business of insurance. Section 626.621(6) made it a violation for an insurance agent to engage in unfair methods of competition or unfair or deceptive acts or practices prohibited by part IX of chapter 626. These statutes similarly are a derivative of other violations, add nothing of substance to the other violations, and do not warrant additional discipline for the violations from which they are derived.

113. Section 626.9541(1)(e)1., which is in part IX of chapter 626, made it a violation for an insurance agent to knowingly make, publish, disseminate, circulate, deliver, or place before the public any false statement.

114. Section 626.9521(2) subjected anyone who violated the Unfair Insurance Trade Practices Act, which is part IX of chapter 626 and includes section 626.9541, to a fine of not greater than $40,000 ($20,000 Count II) per violation, in addition to any other applicable penalty.[7/]

A. Count I – Jewel Frisani

115. As to Count I of the Administrative Complaint,[8/] the clear and convincing evidence establishes that Respondent willfully misled Ms. Frisani into believing that she would not incur surrender charges related to the surrender of her MetLife

annuity contract. Respondent's conduct constitutes a violation of section 626.611(5), (7), and (9). Respondent's conduct also constitutes a violation of section 626.9541(1)(e)1., and rules 69B-215.210 and 69B-215.230.

B. Count II – Fred and Eileen Sarracino

116. Paragraph 36 of the Administrative Complaint alleges, as to Respondent's actions involving the Sarracinos, that:

> [t]he twisting of the Commonwealth annuities into the Old Mutual annuities, was not in the S[arracino]'s best interests, was neither necessary nor appropriate for persons of their financial circumstances, was without demonstrable benefit to them, and was done for the sole purpose of obtaining fees, commissions, money or other benefits from Old Mutual in an amount totaling $31,428.52.

In contrast, Petitioner, in its proposed findings of fact states only, with respect to the ultimate question regarding Respondent's conduct, that Respondent's "misrepresentations skewed the Sarracino's suitability forms, allowing them to pass Old Mutual's underwriting standards by making it seem that there were 'reasonable grounds for believing that the recommendation[s were] suitable.'"

117. Petitioner did not prove by clear and convincing evidence that the Old Mutual annuities were unsuitable for the Sarracinos. The clear and convincing evidence does, however, establish that Respondent's conduct of willfully misrepresenting the financial profile of the Sarracinos is a dishonest practice which also demonstrates that Respondent is not trustworthy. Respondent's

conduct constitutes a violation of section 626.611(5), (7), and (9). Respondent's conduct also constitutes a violation of section 626.9541(1)(e)1., and rules 69B-215.210 and 69B-215.230.

C. Count III – Warren and Darlene Morgan

118. The clear and convincing evidence establishes that Respondent's conduct of willfully misrepresenting the financial profile of the Morgans is a dishonest practice which also demonstrates that Respondent is not trustworthy. Respondent's conduct constitutes a violation of section 626.611(5), (7), and (9). Respondent's conduct also constitutes a violation of section 626.9541(1)(e)1., and rules 69B-215.210 and 69B-215.230.

D. Count VI – Gail Shane

119. The clear and convincing evidence establishes that Respondent's conduct of willfully misrepresenting the financial profile of Ms. Shane is a dishonest practice which also demonstrates that Respondent is not trustworthy. Respondent's conduct constitutes a violation of section 626.611(5), (7), and (9). Respondent's conduct also constitutes a violation of section 626.9541(1)(e)1., and rules 69B-215.210 and 69B-215.230. Additionally, Respondent's conduct of including a yearly withdrawal rider as a part of Ms. Shane's annuity, when there was no objectively reasonable basis for doing so, violates section 627.4554(4)(a).

E. Penalty

120. As to Count I of the Administrative Complaint, the highest stated penalty for Respondent results from his violation of section 626.611(9). The penalty for this violation is suspension of Respondent's licenses for 12 months. Fla. Admin. Code R. 69B-231.080 (2010).

121. As to Count II of the Administrative Complaint, the highest stated penalty for Respondent results from his violation of section 626.611(5). The penalty for this violation is suspension of Respondent's licenses for nine months. Fla. Admin. Code R. 69B-231.080 (2006).

122. As to Count III of the Administrative Complaint, the highest stated penalty for Respondent results from his violation of section 626.611(5). The penalty for this violation is suspension of Respondent's licenses for nine months. Id.

123. As to Count VI of the Administrative Complaint, the highest stated penalty for Respondent results from his violation of section 626.611(9). The penalty for this violation is suspension of Respondent's licenses for 12 months. Fla. Admin. Code R. 69B-231.080 (2010).

124. The total penalty for Respondent's violations of section 626.611 is suspension of his licenses for 42 months. Fla. Admin. Code R. 69B-231.040(2). Due consideration has been given to the aggravating and mitigating factors outlined in rule

69B-231.160. Rule 69B-231.040(3)(d) (2006), provides that "[i]n the event that the final penalty would exceed a suspension of twenty-four (24) months, the final penalty shall be revocation." Respondent's suspension period is 42 months, so in accordance with rule 69B-231.040, the final recommended penalty is revocation.

125. As to Count VI of the Administrative Complaint, Respondent was found to also be in violation of section 627.4554(4)(a), Florida Statutes (2011). Rule 69B-231.110(37) (2010), provides that a violation of section 627.4554 shall result in a 12-month suspension of Respondent's licenses. Respondent's violation of section 627.4554 was considered as part of the "aggravating/mitigating" factors under rule 69B-231.160, which resulted in the 12-month suspension period established by the rule merging into the recommendation for the revocation of Respondent's licenses. Similar rationale applies with respect to the 12-month suspension period authorized by rule 69B-231.100 for the violation of section 626.9541(1).

126. As to Count I, III and VI, Respondent was found to be in willful violation of section 626.9541. Section 626.9521 provides in part that any person who violates any provision of this part "is subject to a fine in an amount not greater than $40,000 for each willful violation." A fine in the amount of

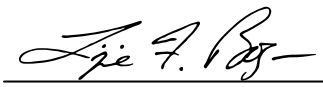
$40,000 is warranted for each violation. The total fine amount for these violations is $120,000.

127. As to Count II, Respondent was found to be in willful violation of section 626.9541, Florida Statutes (2007). Section 626.9521, Florida Statutes (2007), provides in part that any person who violates any provision of this part shall be subject to a fine in an amount "not greater than $20,000 for each willful violation." A fine in the amount of $20,000 is warranted for this violation.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services, Division of Insurance Agents and Agency Services, enter a Final Order finding that Respondent violated sections 626.611(5), (7) and (9), 626.9541(1)(e)1., and 627.4554(4)(a), Florida Statutes. It is further recommended that the Department revoke his Florida licenses to act as an insurance agent in this state and impose against him a fine in the amount of $140,000.

DONE AND ENTERED this 29th day of October, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of October, 2014.

ENDNOTES

[1/] Unless otherwise indicated, statutory references are to the version in effect at the time of the transactions that form the bases of the charges.

[2/] Unless otherwise noted, all rule references are to the version of the Florida Administrative Code that was in effect at the time of the transactions that form the bases of the charges.

[3/] Prior to October 11, 2010, Ms. Frisani had personally met with Respondent one time, on October 5, 2010. Ms. Frisani claims that she didn't read the forms presented to her by Respondent on October 11, 2010, because she trusted him. It is not reasonable that Ms. Frisani would have trusted Respondent with her financial well-being after only a single meeting and consequently her stated reason for why she didn't read the forms that she signed is not credible.

[4/] Included within the Administrative Complaint are allegations that Respondent "never told the [Sarracinos] that the OM contracts had 15 year surrender charge periods" and that he "never told the [Sarracinos] that the OM contracts had surrender charge rates starting at 17.5%." The Administrative Complaint also alleges that Respondent "falsely stated that Mr. and Mrs. [Sarracinos'] primary residence was worth $250,000." On direct

examination, Mrs. Sarracino testified, contrary to the allegations set forth in the Administrative Complaint, that when she and her husband met with Respondent, he "quite possibly" could have discussed with them the 15 year surrender period and that Respondent definitely discussed with them the fact that the surrender penalty would start at 17 1/2 percent "and it would work its way down [from there]." Mrs. Sarracino also testified that it is possible that her primary residence could have been worth $250,000 in 2008, but she really did not know because she "didn't go to the market to ever find out what is was [worth]." The evidence does not support the allegations referenced in this endnote, which likely explains why Petitioner makes no argument with respect to these allegations in its Proposed Recommended Order.

[5/] It is the responsibility of counsel to specify the important parts of the record.

[6/] Petitioner does not allege in the Administrative Complaint that Respondent sold Ms. Shane an illegal product because she was not an "Accredited Investor." The accuracy of the statement on the National Western suitability form regarding what the law provides with respect to the company's ability to sell certain products only to "Accredited Investors" is not before the undersigned. The statement is, however, relevant for the purpose of determining Respondent's motivation and intent when misrepresenting Ms. Shane's financial circumstances on the suitability questionnaire.

[7/] For the Sarracinos (Count II), June 30, 2008, was used as the date for their respective transactions. The 2007 version of section 626.9521 remained effective through June 30, 2008. This version of the statute allowed for a maximum penalty of $20,000. Effective July 1, 2008, the maximum penalty was increased to $40,000.

[8/] Petitioner, throughout its Proposed Recommended Order, makes no argument with respect to certain matters alleged in the Administrative Complaint. As to such matters, the undersigned considers Petitioner's omission as an indication that Petitioner has abandoned these allegations.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.